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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JAMES THEODORE BURGHARDT, JR. et al., Plaintiffs and Respondents, v. BRIGITTE YVON, Defendant and Appellant.	D078370 (Super. Ct. No. 37-2020-00008414-CU-BC-NC)

APPEAL from an order of the Superior Court of San Diego County, Timothy M. Casserly, Judge. Reversed with directions.

Pease Law and Bryan William Pease for Defendant and Appellant.

Worthington Law, Brian Paul Worthington; Law Offices of Christopher A. Villasenor and Christopher A. Villasenor for Plaintiffs and Respondents.

Brigitte Yvon's dog, Davie, was severely burned during or soon after undergoing routine surgery. Yvon settled the potential veterinary malpractice claim against Dr. James Theodore Burghardt, Jr. and his corporate practice, Companion Pet Care, Inc. (collectively, Burghardt). This case erupted later after Yvon posted a very uncomplimentary Yelp review about Burghardt and the incident. Burghardt responded by suing Yvon for breach of a confidentiality provision in the settlement agreement (Agreement) as well as defamation and related causes of action (the Complaint). Yvon's attorneys countered with an anti-SLAPP motion.[1]

Yvon appeals from an order denying that motion. Burghardt concedes that all his claims arise from Yvon's protected activity. The only issue is whether they have minimal merit. On independent review, we conclude they do not. Accordingly, we reverse with directions to enter judgment in her favor.

FACTUAL AND PROCEDURAL BACKGROUND

On February 21, 2019, Burghardt performed a "neuter and scrotal ablation surgery" on Davie.[2] He told Yvon the surgery went well, and she took Davie home that same afternoon.

Davie "whimpered" the first night home. Over the next few days, he was lethargic and "whined some." Yvon stayed home to care for him and "even accompanied him outside to go to the bathroom" to make sure he stayed out of harm's way.

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1 (Code of Civ. Proc., § 425.16; undesignated statutory references are to that code.)

2 Dates are in 2019 unless otherwise specified.

On March 1, Yvon noticed the fur on Davie's back was wet. She assumed he had been licking the area. But when it was wet the next day, she pushed the thick fur aside and saw blood. She clipped away some of the wet fur, revealing a large oozing and bleeding wound. Yvon quickly took Davie to an animal hospital, where the veterinarian found this severe burn under his fur:

Photo 1 - Davie, 10 Days Post-Op

Yvon e-mailed this photograph to Burghardt. Within minutes, he telephoned stating, "I'm so sorry" and that he took "full responsibility." He called it a "third degree" burn and told Yvon it was caused by a "heating pad" used during surgery.

Over the next several days, Burghardt said that he wanted to "do the right thing going forward" and again apologized to Yvon. He assured her that "a mistake like this can never happen again," because "[w]e no longer use hot water bottles as heating elements. We have completely rid of that as a protocol. . . . We will never let it happen again."

On March 15, Davie underwent surgery to remove the dead tissue. The resulting two-foot long incision is shown in the photograph below:

Photo 2 - Incision after debridement

Dissatisfied with Burghardt's delay in reimbursing her for Davie's medical expenses, Yvon posted the following on Yelp:

> "I brought my 2-year old yellow lab into Companion Pet Care on February 21st to get neutered. He went in a healthy, happy dog and came out with third degree burns to at least 20% of his body. . . . We were devastated by what we saw: a bloody, raw wound that was the size of a man's size 11-12 shoe across Davie's back.
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> "On March 4th, I called the vet who performed the neutering procedure and owns this practice, Ted Burghardt . . . . After seeing the pictures he admitted responsibility for the burn citing 'improper heating technique' as the cause and apologized. . . .

> "[Burghardt] was all over the place with a treatment plan, which only added to my anxiety. While all of this was going on, my dog was literally a bloody mess . . . .
>
> "On March 15, the new vet was able to close the wound after cutting out the dead skin and now my dog has over 40 staples in his back and an incision that is over 24 inches long . . . . When I sent the invoice to Burghardt (twice) his response was that it was 'so expensive' and he was 'worried about [his] bank account.' "

She also posted similar reviews on Facebook and other social media. San Diego television stations ran stories about the incident.

In late March, Richard Straub, a "claims specialist" employed by Burghardt's malpractice insurer (Allianz) began negotiating settlement with Yvon. In December, with Yvon now represented by counsel, the parties entered into the Agreement.[3] In addition to previously reimbursed veterinary expenses, Allianz agreed to pay Yvon $6,350 in full settlement of her claims. The Agreement also contained this confidentiality provision:

> "I hereby promise and agree to hold and keep confidential any and all actions, causes of action, claims, demands, damages, fees, costs, loss of services, expenses and compensation and claims/compensation on account of, or in any way relating to or in connection with the terms of this settlement agreement stemming from the services provided by [Burghardt], including but not limited to any and all social media platforms."

About a month later, Burghardt noticed that the Yelp review was still online. Communicating through Straub, he insisted that Yvon take it down, claiming it violated the Agreement. Yvon's lawyer disagreed, stating, "My

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[3] The Agreement, entitled "Release of Claims and Confidentiality Agreement" is signed only by Yvon. In the Complaint, Burghardt alleges he is a third-party beneficiary. Yet, in a subsequent superior court filing, his attorney stated, "Dr. Burghardt did not sign the agreement and is not bound by its terms." We need not, and do not address that issue here.

understanding was that the past Yelp reviews being removed were not part of the settlement terms."

Ultimately, Yvon agreed to remove her Yelp review, but on the condition that two other reviews about the incident, complimentary of Burghardt, were also removed within two days. In January 2020, Yvon removed her Yelp review. But when the other two remained online after the deadline, she reposted it with this title:

> "THIS VET BURNED/CAUSED THE WOUND IN THE PICTURES TO MY DOG—NO QUESTION. I AM THE DOG OWNER. THERE IS AN ANIMAL WHO SUFERED. THIS INCIDENT WAS FEATURED BY ABC NEWS (link below).

A few weeks later, Burghardt sued Yvon alleging (1) breach of contract; (2) tortious breach of contract; (3) intentional interference with prospective business advantage; (4) intentional infliction of emotional distress; (5) negligent infliction of emotional distress; (6) civil harassment; and (7) defamation.[4] Responding with an anti-SLAPP motion, Yvon asserted that her statements were protected speech, having been made in a public forum on a matter of public interest. (§ 425.16, subd. (e)(3).) She argued that Burghardt's claims lacked merit because (1) the confidentiality provision "was specifically negotiated" to allow her to discuss the incident; and (2) Burghardt "admitted the truthfulness" of her assertions that he burned Davie.

Burghardt conceded that all his claims arose from Yvon's protected activity. Moving to "the second prong for all causes of action," he asserted

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[4] The Complaint also purports to allege causes of action for injunctive relief and specific performance; however, Burghardt concedes these are remedies, not theories of recovery. As we will explain, because all of his substantive claims lack minimal merit, it is unnecessary to address remedies.

Yvon breached the confidentiality provision, and Davie's injuries must have been caused by a "hot muffler, hot water or grease from a stovetop" or from "household cleaning agents" and "even certain plants common in many backyards."

The trial court denied Yvon's motion after determining that Burghardt's claims have "minimal merit."

DISCUSSION

A. *Anti-SLAPP Framework*

"[T]he anti-SLAPP statute is designed to protect defendants from meritless lawsuits that might chill the exercise of their rights to speak and petition on matters of public concern." (*Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 883–884 (*Wilson*); § 425.16, subd. (a).) To achieve this goal, a defendant may file a special motion to strike claims "arising from any act of that person in furtherance of the person's right of petition or free speech . . . in connection with a public issue[,] . . . unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) Through this summary-judgment-like procedure, the anti-SLAPP statute aims to weed out meritless or retaliatory litigation at an early stage. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 312.)

Courts use a two-step process to resolve anti-SLAPP motions. In the first stage, the moving defendant must show the claims arise from the defendant's protected activity. (*Wilson, supra*, 7 Cal.5th at p. 884.) If so, then "[t]he court, without resolving evidentiary conflicts, must determine whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment." (*Baral v. Schnitt* (2016) 1 Cal.5th 375, 396.) We review the denial of an anti-SLAPP motion de novo. (*Park v.*

Board of Trustees of California State University (2017) 2 Cal.5th 1057, 1067.) Because Burghardt concedes all his claims arise from Yvon's protected activity, we go directly to the second step.

B. *The Contract Claims Lack Minimal Merit*

1. *Additional Background*

The Agreement contains two confidentiality provisions, but only one is relied on by Burghardt in support of his claims.[5] It appears in the third paragraph. As originally drafted by Allianz, this provision stated:

> "[Yvon] promise[s] and agree[s] to hold and keep confidential any and all actions, . . . claims, demands, damages . . . in any way relating to or in connection with the services provided by [Burghardt], including but not limited to any and all social media platforms."

Yvon was amenable to keeping the settlement itself confidential. But she insisted on being able to talk about what happened because, in her words, "there were no other avenues available to inform potential clients about the events." So after reviewing the draft provided by Allianz, Marc Robinson, a New York lawyer employed as a paralegal by Yvon's attorney, asked Straub, the Allianz claims representative, to insert language (in boldface, italics below) to limit the scope of the confidentiality provision, so that it would read:

> "[Yvon] promise[s] and agree[s] to hold and keep confidential any and all actions, . . . claims, demands, damages . . . in any way relating to or in connection with ***the terms of this settlement agreement stemming from*** the services provided by [Burghardt], including but not limited to any and all social media platforms."

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[5] The second is near the end of the Agreement and states that the release "and the fact that a payment has been made" will be kept confidential.

In an accompanying e-mail to Straub, Robinson explained, "The reason for this insertion goes to what we discussed: that [Yvon] has to be able to just talk about what happened to Davie. If left as is, it seems to us that she would never be able to say anything at all about the incident." Straub inserted this language verbatim and attached the revised Agreement in an e-mail to Robinson stating, "Try this one on." Yvon signed it the next day.

Thus, originally the third paragraph would have required Yvon "to hold and keep confidential any and all . . . claims/complaints on account of, or in any way related to or in connection with the *services provided*." (Italics added.) But instead, as revised, it reads: "hold and keep confidential any and all . . . claims/complaints on account of, or in any way related to or in connection with *the terms of this settlement agreement stemming from* the services provided." (Italics added.)

2. *As Revised, the Confidentiality Provision Does Not Prohibit Social Media Posts About the Incident*

Relying on the third paragraph of the Agreement, Burghardt's Complaint alleges that Yvon "explicitly agreed to hold and keep confidential any and all information related to . . . the Agreement *or* stemming from the Services . . . ." (Italics added.)[6] The first cause of action alleges Yvon breached the Agreement by "re-posting the Yelp review." The second cause of action, entitled "Tortious Breach of Contract," is based on essentially the same allegations.

The trial court determined the confidentiality provision was ambiguous and, therefore, extrinsic evidence was admissible to construe it. Evidence that Yvon removed her Yelp review after settlement (albeit for only two days)

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6 Interestingly, Burghardt's Complaint uses the word "or," which is not actually in the text of the confidentiality provision.

allowed, in the court's view, an inference that Yvon understood the Agreement prohibited social media posts about the incident. This, the court ruled, was enough to survive the anti-SLAPP motion.

Whether a contractual provision is ambiguous is a question of law reviewed de novo. (*Curry v. Moody* (1995) 40 Cal.App.4th 1547, 1552.) For two reasons, we disagree with the trial court's assessment. When Yvon agreed "to hold and keep confidential" certain matters, her Yelp review had already been online for nine months. It is impossible to "hold and keep confidential" something that has been accessible for nearly a year to anyone with an internet connection. Whatever the intended scope of the confidentiality clause, it could not have included Yvon's Yelp post. That cat was already out of the bag.

Additionally, the phrase "stemming from the services provided" is a compound adjective, not a noun. It modifies "settlement agreement." In other words, the matter that must be kept confidential is *the settlement*. Which settlement? The one "stemming from the services provided." Contrary to the allegation in Burghardt's complaint, the confidentiality provision cannot be read to prohibit disclosure of two different categories of information, i.e., matters (a) related to the Agreement, *or* (b) stemming from the veterinary services provided by Burghardt.

Moreover, even if the confidentiality provision were ambiguous we would reach the same result. Interpreting an ambiguous contract term is a question of law subject to independent review if no extrinsic evidence was introduced as to its meaning or, if extrinsic evidence was introduced, the evidence was not in conflict. (*Medical Operations Management, Inc. v. National Health Laboratories, Inc.* (1986) 176 Cal.App.3d 886, 891 ["it is only when the foundational extrinsic evidence is in conflict that the appellate

court gives weight to anything other than its de novo interpretation of the parties' agreement"].) Here, the extrinsic evidence itself was not in conflict, although the inferences derived from it are polar opposites. Where conflicting inferences may be drawn from uncontroverted evidence, it is " 'solely a judicial function to interpret a written contract.' " (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1134, fn. 18; *Brown v. Goldstein* (2019) 34 Cal.App.5th 418, 433.) We must determine "what the outward manifestations of consent would lead a reasonable person to believe." (*Meyer v. Benko* (1976) 55 Cal.App.3d 937, 942–943.)

While there were undoubtedly more artful ways of saying it, Robinson was not writing on blank paper. Allianz drafted the original language, and that was the framework within which he was working. The resulting sentence ("the terms of this settlement agreement stemming from the services provided") might make an English teacher cringe. But in his accompanying e-mail, Robinson unambiguously explained that the requested change was to enable Yvon to discuss the incident: "[Yvon] has to be able to just talk about what happened to Davie."

If Straub on behalf of Burghardt was insisting, contrary to Robinson's position, that Yvon "would never be able to say anything . . . about the incident," the time to object was then. But instead of rejecting the proposed revision, Straub incorporated it verbatim into the final version with the pithy comment, "Try this one on." The most objectively reasonable conclusion is that the parties were agreeing Yvon could discuss the underlying incident but not the settlement. (See *Aozora Bank, Ltd. v. 1333 North California Boulevard* (2004) 119 Cal.App.4th 1291, 1296.) In light of the language of the confidentiality provision and the broader context in which it was negotiated, we hold that it does not apply to Yvon's Yelp review. Thus, Burghardt failed

to make a prima facie showing on the essential element of breach of contract. (See *Olson v. Doe* (2022) 12 Cal.5th 669, 679–680, 684 [holding that nondisparagement clause in a mediation agreement did not apply to certain statements and, therefore, cross-complainant failed to make a prima facie showing of breach to overcome anti-SLAPP motion].)

In seeking to uphold the trial court's ruling, Burghardt focuses on the word "claims." Yvon agreed to keep her "claims" related to the settlement confidential. Because the settlement resolved veterinary malpractice "claims," Burghardt contends the incident itself cannot be discussed.

This is a reasonable argument as far as it goes, but the problem is that it considers only one word—claims. Words in a contract must be understood not in isolation, but in the context of the entire agreement, including the subject matter and circumstances under which it was made. (*Camacho v. Target Corp.* (2018) 24 Cal.App.5th 291, 306.) Here, that context includes a negotiated change in language specifically designed so that Yvon *could discuss the incident*. When viewed in that light, as it must be, the word "claims" means only those related to the "the terms of the settlement agreement." Because the Yelp review said nothing about the terms of the settlement, Burghardt's allegation that Yvon breached the Agreement lacks minimal merit.

The contrary inference from the fact that Yvon removed her review after signing the Agreement is too attenuated. The review stayed up for about a *month* after she signed the Agreement. If it was prohibited, one would have expected Burghardt to demand it be removed much sooner. Moreover, at its core Burghardt's argument is that because Yvon removed her review after entering into the Agreement, she did so *because* of the Agreement. But this reasoning is flawed because it mistakes temporal

sequence for causal connection.[7] (See *Citizens for Odor Nuisance Abatement v. City of San Diego* (2017) 8 Cal.App.5th 350, 363 [no triable issue where plaintiff attempted to establish causation through mere temporal sequence].)

In a related argument, Burghardt notes that a day before Yvon signed the Agreement, Robinson sent Straub an e-mail stating she had "taken down her social media posts." Burghardt contends Yvon would do this only if required by the confidentiality provision. If that were all the evidence on this point the inference Burghardt draws might be a reasonable one. But it is not the full picture.

To begin with, there is a problem with timing. Robinson sent that e-mail at 11:42 a.m. Only later that afternoon did he ask Straub to insert language allowing Yvon to discuss the incident. Thus, when Robinson represented that Yvon had taken down the posts, there was no agreement that obliged her to do anything. We can only speculate as to what might have been said in the preliminary negotiations between the parties that caused Yvon to voluntarily remove social media posts other than the Yelp review. What is clear, however, is that within a matter of a few hours Robinson proposed and Straub accepted revisions to the Agreement on this very point, which demonstrates that Yvon understood she had not yet agreed to anything with regard to the scope of her confidentiality obligations.

Moreover, Yvon's declaration admits that she agreed to remove ' "social media' " posts—but "with the exception of the Yelp review." She "*always* maintained" that she wanted to keep the Yelp review online because "there were no other avenues available to inform potential clients" about Davie's

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[7] (See, e.g., *Franklin v. Dynamic Details, Inc.* (2004) 116 Cal.App.4th 375, 394 ["A cause and effect relationship based upon such a temporal sequence is a classic example of the logical fallacy of post hoc, ergo propter hoc (literally, 'after this, therefore because of this')."].)

incident and injuries. That is precisely why Robinson specifically negotiated a change in Allianz's standard confidentiality provision to enable her to do so. The fact that she removed the non-Yelp social media posts *before* any agreement was reached indicates that she did so because she was willing to, not because she was required to.

In determining the quality of evidence that suffices to create a triable issue (that is, "minimal merit" in the anti-SLAPP context), the "ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the *whole record*"—not isolated bits of evidence. (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 652, italics added.) Here, the whole record consists of not just the seven-word e-mail ("She has taken down her social media posts"), but also the negotiated change occurring later that day designed to allow the Yelp review to remain online without breaching the confidentiality provision. Reasonably interpreted, the Agreement did not preclude Yvon from discussing the incident online or otherwise.

C. *The Defamation Claim Lacks Minimal Merit*

Defamation is the intentional publication of a statement of fact that is " 'false, unprivileged, and has a natural tendency to injure or which causes special damage.' " (*Sonoma Media Investments, LLC v. Superior Court* (2019) 34 Cal.App.5th 24, 37.) To prove it, a private figure must establish, at minimum, that the defendant failed to use reasonable care to determine the truth or falsity of the statement. (*Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 398 ["private figures need prove only negligence"]; *Carney v. Santa Cruz Women Against Rape* (1990) 221 Cal.App.3d 1009, 1016.)

Here, the Complaint alleges Yvon "published false and defamatory statements" about Burghardt "on Yelp and Facebook." To establish a prima

facie defamation case, Burghardt filed a declaration stating it was "unlikely" that he caused the burn "given that Yvon did not first notice it until 10 days after surgery." Although admitting that he apologized and said he would "never let it happen again," Burghardt claimed this was merely an "effort to console" Yvon. He also described conducting an experiment confirming "that anyone carrying a warmed water bottle that was too hot for use" would discover it before being used on an animal. After reviewing Davie's records, he noted that the dog was "good at getting into things" and would eat "plants, wood, and even the bricks outside." From all this, Burghardt concluded, "Davie's injuries were not sustained during surgery."

We agree that Burghardt's declaration creates a triable issue on whether the claimed defamatory statements are false. But to establish minimal merit on this claim, Burghardt also has to show that Yvon failed to exercise reasonable care in determining whether her statements were true. According to the trial court, this same evidence about *how* Davie was burned *also* creates a triable issue on whether Yvon exercised reasonable care in determining her statements were true:

> "[W]hile the issue of reasonable care is a step removed from proof of actual truth or falsity, the fact that [Burghardt] has produced sufficient evidence to meet the 'minimal merits' standard and show that he was not, in fact, the cause of injury to the dog . . . also establishes 'minimal merits' on the question of whether [Yvon] failed to use reasonable care to determine the truth or falsity of that issue."

The trial court's analysis is incorrect. The reasonableness of Yvon's conduct must be determined by what *she* knew or should have known about the cause of Davie's burn, not what Burghardt might have *privately* believed to be the cause. Her knowledge stems from what Burghardt told her. For example:

- March 6: "I am taking this very seriously. I want to, you know, do the right thing to, you know, the damage has happened, and I wish it hadn't. It's a terrible thing. Um, I feel so badly about it."
- March 8: "Our facility strives to provide the highest standard of care, and a mistake like this can never happen again. I have made permanent, immediate changes to that effect. I again apologize for what Davie and you are going through . . . ." [¶] . . . [¶]

  "We no longer use hot water bottles as heating elements. We have completely rid of that as a protocol."
- March 11: "I again fully apologize and take responsibility."[8]
- March 13: Davie's burn was caused by a hot saline bag pressed against his back while he was unconscious after the neutering procedure. He has now stopped using hot saline bags and has purchased special equipment (called a "HotDog") to keep animals warm during surgery.

In light of these admissions by Burghardt himself, a reasonable person in Yvon's position could believe nothing *other* than that Davie sustained third degree burns while under Burghardt's care.

In urging a different conclusion, Burghardt contends that when he apologized, "it was in the context of saying he was sorry she and Davie were suffering with this, and not that he was sorry because he was admitting fault." But even if this is what he meant, the reasonableness of Yvon's belief cannot be based on Burghardt's *unexpressed subjective intent*, but rather on how a reasonable person in Yvon's position would have understood his express words. His statements such as, "I again fully apologize and take responsibility," and "a mistake like this can never happen again," can reasonably be interpreted only one way.

In a related argument, Burghardt contends, "[P]eople often say they are sorry when they hear someone was in a car accident, not because they

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8 In a declaration opposing the anti-SLAPP motion, Burghardt denied stating that he "took 'full responsibility.' " However, in an e-mail dated March 11, he wrote to Yvon, "I again fully apologize and take responsibility."

were at fault for the accident, but because they feel badly" the person was injured. He further asserts that Yvon became "unhinged," throwing things and "screaming obscenities" at his staff. He contends he apologized not to admit fault, but just to calm her down.

In the context of the anti-SLAPP motion, we accept all that as true. But, again, the key issue is not whether Burghardt subjectively intended to admit responsibility or fault, but rather if there is evidence showing that Yvon negligently determined that he did. There is none.[9]

D. *The Intentional Interference With Prospective Economic Advantage Claim Lacks Minimal Merit*

Burghardt's third cause of action alleges that Yvon's social media posts "intentionally interfered" with his economic relations with potential clients." The Complaint further alleges that Yvon's conduct constituted a "breach of the Agreement" and "[a]s such" was "independently wrongful."

To establish a prima facie claim for intentional interference with a prospective economic advantage, Burghardt must show (1) an economic relationship between himself and a third party, with the probability of future economic benefit; (2) Yvon's knowledge of the relationship; (3) that she interfered with that relationship by "independently wrongful" conduct; (4) and either intended to interfere with the relationship or " 'knew that the interference was certain or substantially certain to occur' "; which (5) caused economic harm. (*Drink Tank Ventures LLC v. Real Soda in Real Bottles, Ltd.* (2021) 71 Cal.App.5th 528, 537–538 (*Drink Tank*).) The trial court determined Burghardt met this burden by offering evidence (1) that he

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9 In light of this disposition, it is unnecessary to address Yvon's alternative argument that Burghardt failed to show evidence of special damages, which she contends is another essential element of his claim.

did not burn Davie; and (2) Yvon's intent was to "drive business away from what she apparently believed was a dangerous vet."

The problem here is the analysis does not consider *all* the essential elements and is, therefore, incomplete. For example, Burghardt must show Yvon's conduct was "independently wrongful." He attempts to do so by alleging that the social media reviews breached the confidentiality provision. As we have already determined, however, there is insufficient evidence to create a triable issue that Yvon breached the confidentiality provision. Moreover, as a matter of law, "a breach of contract cannot constitute the 'wrongful' conduct required for the tort of interference with prospective economic advantage." (*Drink Tank*, *supra*, 71 Cal.App.5th at p. 540.) Accordingly, the Complaint does not even allege a cognizable intentional interference claim. It should have been stricken on this ground alone. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88–89 [the claim must be " ' "legally sufficient." ' "].)

This claim also fails because there is no evidence that the requisite economic relationship was disrupted. " '[A] plaintiff that wishes to state a cause of action for [intentional interference with prospective economic advantage] must allege the existence of an economic relationship with some third party that contains the probability of future economic benefit to the plaintiff.' [Citations.] An actual economic relationship with a third party is required, and liability cannot be premised on ' " 'the more speculative expectation that a potentially beneficial relationship will arise' " ' in the future." (*Muddy Waters, LLC v. Superior Court* (2021) 62 Cal.App.5th 905, 926.) A tortious interference claim that rests on a hope of future transactions, or on a loss of customers in general, is insufficient. (*Vascular*

Imaging Professionals, Inc. v. Digirad Corp. (S.D. Cal. 2019) 401 F.Supp.3d 1005, 1013.)[10]

Burghardt submitted no evidence of any specific third party with whom he had an existing economic relationship, let alone a one that was damaged by Yvon's online review. In a declaration Burghardt states he "was very concerned over the damage Yvon's false online reviews were doing" to his business, but he offered no evidence that even one potential client sought veterinary services elsewhere due to her statements. He further stated that unless the Yelp review is removed, he "will continue to lose clients, both current and potential"—but again, he provides no specific evidence to support that broad claim.

The Supreme Court explained, "a cause of action for tortious interference has been found lacking when either the economic relationship with a third party is too attenuated or the probability of economic benefit too speculative." (*Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.* (2017) 2 Cal.5th 505, 515 (*Roy Allan*).) The *Roy Allan* decision discussed with approval *Westside Center Associates v. Safeway Stores 23, Inc.* (1996)

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10 Citing *Youst v. Longo* (1987) 43 Cal.3d 64, Burghardt contends he need only show a "reasonable probability" of lost business. In *Youst*, a competitor in a horserace blocked and whipped plaintiff's horse during the race in order to halt its stride. (*Id.* at p. 77, fn. 9). The plaintiff claimed that this misconduct caused his horse to fall out of contention and thus interfered with his opportunity to finish higher in the race. The Supreme Court held that the plaintiff had not stated a claim for interference with economic advantage for several reasons, including because the plaintiff had failed to allege facts showing that his horse would have placed higher absent the defendant's interference. Thus, *Youst* refuses to protect mere expectancies. Later Supreme Court cases applying *Youst* have required evidence of "actual disruption" of an economic relationship. (See *Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1129, fn. 8, 1130 [collecting cases].) Our analysis is consistent with these principles.

42 Cal.App.4th 507 (*Westside Center*), which interpreted Supreme Court precedent "to require proof that the defendant had disrupted a particular relationship with a known third party." (*Roy Allan*, at p. 516.)

Burghardt's failure to produce any evidence in support of this threshold element of a claim for intentional interference with prospective economic advantage is yet another basis to conclude that it lacks minimal merit.

E. *The Emotional Distress Claims Lack Minimal Merit*

The fourth and fifth causes of action assert intentional and negligent infliction of emotional distress respectively. The Complaint alleges that Yvon's social media posts are "extreme and outrageous," or alternatively, "negligent" and caused "severe emotional distress." The trial court determined these claims had minimal merit because there was a triable issue whether Burghardt or someone/something else caused Davie's burn.

But to establish intentional infliction of emotional distress, there must be evidence that Yvon's conduct was "extreme and outrageous"—that is, it exceeded " 'all bounds usually tolerated by a decent society, of a nature which is especially calculated to cause, and does cause, mental distress.' " (*Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 155, fn. 7.) Thus, Yvon's liability, if any, turns *not* on whether there is evidence that Burghardt did not burn Davie, but rather whether she unreasonably believed that he did.

As we have already explained in the context of the defamation claim, the only inference a reasonable person could draw from Burghardt's admissions is that Davie was burned during or immediately after surgery when he was still unconscious. In his brief, Burghardt claims that Yvon "jumped the gun" and should have "waited for or sought confirming indicators." (Italics & boldface omitted in second quote.) But when a medical professional says, "I take full responsibility," "a mistake like this can never

happen again," and writes in the patient's chart, "appears suspicious from heating element usage during his neuter"—what is there to confirm? The standard is a reasonable belief, not absolute certainty.

Accordingly, we conclude as a matter of law that Yvon's social media posts about the incident are not "extreme and outrageous" conduct. The intentional infliction claim should have been stricken for lack of minimal merit.

Burghardt also asserts that Yvon engaged in outrageous conduct by "terroriz[ing]" him and his staff and "screaming obscenities" and throwing "things" at them. However, this is not alleged in the Complaint, which refers *only* to social media posts as constituting the requisite outrageous conduct. To make this argument, Burghardt would first have to seek and obtain leave to amend the Complaint and, as a general rule, "[t]here is no such thing as granting an anti-SLAPP motion with leave to amend." (*Dickinson v. Cosby* (2017) 17 Cal.App.5th 655, 676; see also *Medical Marijuana, Inc. v. ProjectCBD.com* (2020) 46 Cal.App.5th 869, 900 (*Medical Marijuana, Inc.*) [denying leave to amend to allege different conduct that would inevitably trigger a " 'fresh motion to strike' "]; but see *Nguyen-Lam v. Cao* (2009) 171 Cal.App.4th 858, 873.)

The negligent infliction of emotional distress claim fails for similar reasons. To begin, "there is no independent tort of negligent infliction of emotional distress." (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 984.) The tort is negligence, and " 'the traditional elements of duty, breach, causation, and damages apply.' " (*Belen v. Ryan Seacrest Productions, LLC* (2021) 65 Cal.App.5th 1145, 1165.) There is no evidence that Yvon breached any duty of care. Based on Burghardt's admissions, the only plausible conclusion she could draw was that he caused Davie's burn.

F. *The Civil Harassment Claim Lacks Minimal Merit*

Section 527.6 provides, "A person who has suffered harassment . . . may seek . . . an order after hearing prohibiting harassment." Harassment includes "a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be that which would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the petitioner." (§ 527.6, subd. (b)(3).) Further, " 'course of conduct' " is defined as "a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose." (*Id.*, subd. (b)(1).)

In the sixth cause of action, the Complaint alleges Yvon "engaged in a knowing and willful course of harassing conduct" consisting of: "a) e-mails and letters threatening to post false, negative, damaging, and misleading reviews on social media; b) the actual posting of said reviews . . . ; and c) directing CBS News 8 San Diego and ABC News 10 San Diego . . . stations to run false, negative, damaging, and misleading news stories." The trial court determined this claim had minimal merit based on a declaration filed by Burghardt stating that Yvon "came to the veterinary clinic, threw things, and made threats of violence" including that she " 'wanted to strangle him.' " It concluded that "there is an overarching effort here by [Yvon] to find some way to retaliate against [Burghardt] for what she believed to be his role in injuring her dog."

On appeal, Burghardt seeks to uphold the ruling on these same grounds, claiming that Yvon said, " 'I want to strangle you,' " verbally abused his staff, and "threw a leash" at an employee. He asserts that "[t]his is prima facie evidence of 'a credible threat of violence' toward Burghardt." But as was

true with the emotional distress claims, none of these facts are alleged in the Complaint as constituting prohibited harassment. And Burghardt has not sought leave to amend, nor could he successfully do so. (*Medical Marijuana, Inc.*, *supra*, 46 Cal.App.5th at p. 900.)

DISPOSITION

The order denying Yvon's anti-SLAPP motion is reversed with directions to enter a new order granting the motion and entering judgment in her favor. On remand, Yvon may timely avail herself of section 425.16, subdivision (c)(1) ("a prevailing defendant on a special motion to strike shall be entitled to recover that defendant's attorney's fees and costs"). Yvon is also entitled to costs incurred on appeal.

DATO, J.

WE CONCUR:

AARON, Acting P. J.

DO, J.